STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 19, 2022

IN THE MATTER OF:
Appeal Board No. 621520

PRESENT: RANDALL T. DOUGLAS, MEMBER

In Appeal Board Nos. 621519 and 621520, the employer appeals from the decisions of the Administrative Law Judge filed February 3, 2022, insofar as the decisions overruled the initial determinations holding, effective June 29, 2020, that the wages paid to the claimant, a non-professional employee of an educational institution, cannot be used to establish a valid original claim between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (11); charging the claimant

with an overpayment of Federal Pandemic Unemployment Compensation of $2400.00 recoverable pursuant to § 2104 (f)(2) of the Coronavirus Aid, Relief and

Economic Security (CARES) Act of 2020; and charging the claimant

with an overpayment of Lost Wages Assistance benefits of $1800.00 recoverable pursuant to 44 CFR

§ 206.120 (f)(5).

At the combined telephone conference hearings before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances on behalf of the claimant and the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant is employed as a bus driver by the Fairport

Central School District (FCSD). The claimant works as a permanent 10-month employee. She has worked for FCSD, since May 22, 2014. Her employment is covered by a collective bargaining agreement which runs through June 30, 2021.

The claimant worked full-time, 5.75 hours per day, five days per week during the 2019-2020 school year. She earned $16.00 per hour, or $19,331.82, in the 2019-2020 school year. The schools closed due to the pandemic on March 16, 2020. The FCSD continued to pay the claimant through the end of the school year.

The claimant is number 46 out of 86 drivers on the seniority list. Reductions and layoffs are made in order of seniority.

The FCSD provided the claimant a letter of reasonable assurance for the 2020-2021 school year, via email and regular mail, dated May 29, 2020. On June 5, 2020, the claimant signed and returned the letter, indicating her intention to resume her employment. The claimant applied for unemployment insurance benefits on June 25, 2020. The claimant received the unemployment insurance benefits in question.

The FCSD submitted its reopening plan for the 2020-2021 school year to New York State on or after July 4, 2020. The FCSD anticipated reopening full-time and operating in a hybrid fashion. The school district anticipated bringing students back four days per week only, with one day of virtual learning. The plan was approved by New York State as of August 7, 2020. On August 7, 2020, the FCSD sent the claimant a salary notice, indicating that her rate of pay had been increased to $16.44 per hour.

Prior to the start of the school year, in September 2020, a refresher course was offered to bus drivers. The FCSD trainer indicated that it was unclear still as to the plans for the school year's operations and opined that bus drivers might be reduced to four hours per day. The trainer expressed his concern as to whether there would be layoffs.

The witness for the FCSD is the assistant superintendent of human resources. His job duties include overseeing the recruitment and retention of employees, including bus drivers. He is the chief contract negotiator for the FCSD and negotiated with the union representing bus drivers and attendants as to the terms of their contract. He signed the letter of reasonable assurance sent to the claimant.

OPINION: Pursuant to Labor Law § 590 (11), the wages paid to a claimant who

worked for an educational institution in other than an instructional, research or principal administrative capacity cannot be used to establish a valid original claim or a benefit rate, during a period between academic years or terms or during an established and customary vacation period or holiday recess, if the claimant has reasonable assurance of performing similar services in the next academic year or term, or during an established and customary vacation period or holiday recess for the period immediately following such vacation period or holiday recess.

The employer has established, with competent testimony from its witness, the assistant superintendent of human resources, that he possesses experience sufficient to testify about the claimant's position and tenure, and the terms of the collective bargaining agreement. We note that the employer's representative authored the letter of reasonable assurance and more significantly, was the lead negotiator, with the claimant's union, as to the collective bargaining agreement which would govern the terms of the claimant's continued employment. Accordingly, his testimony serves as probative evidence. (See Appeal Board Nos. 613375 and 576121).

The United States Department of Labor Employment & Training Administration Unemployment Insurance Program Letter (UIPL) 5-17, dated December 22, 2016, gives guidance with respect to interpreting the meaning of reasonable assurance under § 3304 (a)(6)(A)(i) -(iv) of the Federal Unemployment

Insurance Tax Act (FUTA). Pursuant to UIPL 5-17, in order for a claimant to have reasonable assurance in the following year or term, the offered employment must satisfy three prerequisites: (1) the offer of employment may be written, oral, or implied, and must be a genuine offer; that is, an offer made by an individual with actual authority to offer employment; (2) the employment offered in the following year or term, or remainder of the current academic year or term, must be in the same capacity; and (3) the economic conditions of the job offered may not be considerably less in the following academic year or term (or portion thereof) than in the first academic year or term (or portion thereof). The Department interprets "considerably less" to mean that the economic conditions of the job offered will be less than 90 percent of the amount the claimant earned in the first academic year or term.

While reasonable assurance may exist by virtue of a contract of employment for services, the mere existence of a collective bargaining agreement does not negate the claimant's right to challenge the bona fides of the alleged offer where the employer's own actions undercut the bona fides of such an offer. (See Appeal Board No. 614677)

The claimant has rebutted the bona fides of the employer's offer. The employer had not yet established, or submitted, its plans for operation for the 2020-2021 school year at the time the letter of reasonable assurance was sent to the claimant. Instead, the operational plan was submitted after July 4, 2020. It was not approved until August 7, 2020. That proposed operational plan anticipated one day of virtual learning per week, thereby reducing potential bus runs from five to four days per week. We further find that, as of September 2020, the prospect of layoffs and reductions in hours were still being considered. Therefore, the claimant's employment and schedule remained uncertain up until the start of the 2020-2021 school year. Under these circumstances we cannot conclude that the employer could assure that the economic terms and conditions of the next academic year in 2020-2021 would be substantially similar to that of the prior year, 2019-2020, when the claimant was sent the alleged offer of reasonable assurance, or thereafter, until the start of the new school year.

We further find that the cases submitted by the employer, where reasonable assurance was found, are factually distinguishable. In Appeal Board No. 614896, we note that the claimant had significantly more seniority than that of the claimant herein, and that the decision itself did not reflect a similar reduction in the claimant's hours and days of work. In Appeal Board Nos. 613042 and 614922, the claimants' hours and runs remained the same from year to year. Finally, we note that in Appeal Board No. 592136, the claimant was a teacher and in Appeal Board No. 612541, a school nurse, such that the terms and conditions of employment were different from the claimant herein, a bus driver.

Accordingly, we conclude that the claimant did not have reasonable assurance of performing services in a similar capacity, for substantially the same terms and conditions, at the same educational institution in the next academic year. (See Appeal Board No. 615712). Consequently, we find that the exclusionary provisions of Labor Law § 590 (11) do not apply and the claimant is eligible

to receive unemployment insurance benefits. We further conclude that because

the claimant is entitled to the unemployment insurance benefits which she received, there is no recoverable overpayment of unemployment insurance benefits.

DECISION: The combined decision of the Administrative Law Judge, insofar as appealed from, is affirmed.

In Appeal Board Nos. 621519 and 621520, the initial determinations, holding, effective June 29, 2020, that the wages paid to the claimant, a non-professional employee of an educational institution, cannot be used to establish a valid original claim between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590

(11); charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of $2400.00 recoverable pursuant to § 2104 (f)(2) of

the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and charging the claimant with an overpayment of Lost Wages Assistance

benefits of $1800.00 recoverable pursuant to 44 CFR § 206.120 (f)(5), are

overruled.

The claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER